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IN THE
COURT OF APPEALS OF INDIANA

ROBERT HOLT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0508-CR-472
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus-Stinson, Judge
Cause No. 49G06-0408-FA-139320

September 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Robert Holt appeals his two convictions for Attempted Sexual Misconduct with a Minor, as Class B felonies, and his adjudication as an habitual offender. He presents the following issues for our review:

1. Whether the trial court erred when it allowed the State to amend the charging information on the day of trial.

2. Whether the trial court abused its discretion when it informed the jury that at the time of the alleged offenses, Holt was subject to a court order that he never be alone with nor have any contact with a child under the age of eighteen.

3. Whether the trial court abused its discretion when it prohibited Holt from cross-examining the victim regarding her probation status and her twin sister's pregnancy.

4. Whether the evidence was sufficient to support his convictions.

5. Whether the trial court abused its discretion when it relied on the victim's age as an aggravator and whether his sentence is inappropriate in light of the nature of the offenses and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On June 28, 2004, S.T., who was thirteen years old at the time, flirted with Holt, who was thirty-five years old, at a gas station in Indianapolis. S.T. gave Holt her phone number, and he called her on July 20, 2004, to tell her that he was on his way to her house. After a short visit, Holt left, but returned a couple of hours later. During that second visit, S.T., Holt, and S.T.'s little sister were sitting in

Holt's car when another car pulled up and parked in front of Holt's car. Some men got out of the other car and, when Holt got out of his car, the men fired guns at Holt. Holt sustained three gunshot wounds and was treated at a local hospital.

On July 28, 2004, Holt picked up S.T. in his car, and she lied and told him that she was fifteen years old. Holt lied and told S.T. that he was nineteen years old. They went to S.T.'s house, where only S.T.'s twin sister was present, and S.T. and Holt went upstairs to a bedroom. Holt performed oral sex on S.T. and then had sexual intercourse with her. A few days later, Holt returned to visit S.T., but she had learned that Holt had lied about his name and age. Holt left S.T.'s house after a confrontation.

The State charged Holt with two counts of child molesting, as Class A felonies, and two counts of attempted sexual misconduct with a minor, as Class B felonies. In addition, the State alleged that Holt was a repeat sexual offender and an habitual offender. On the first day of trial, the State filed a motion to amend the charging information by interlineations to change the word "fourteen (14)" to "sixteen (16)" due to a clerical error. The trial court granted that motion over Holt's objection. The jury found Holt not guilty of the two child molesting counts but guilty of the two attempted sexual misconduct with a minor counts. Holt waived a jury trial on the repeat sexual offender and habitual offender counts, and the trial court adjudicated him on both counts.

At sentencing, the trial court found that Holt had violated the terms of his probation and revoked his probation in each of three separate causes. And the trial

court identified five aggravators in imposing concurrent twenty-year sentences for the two Class B felony convictions in this case, enhanced by thirty years for the habitual offender adjudication, for a total sentence of fifty years. This appeal ensued.[1]

DISCUSSION AND DECISION

Issue One: Amended Information

Holt contends that the trial court erred when it permitted the State to amend the charging information on the first day of trial. But the State responds that, because Holt failed to request a continuance, the issue is waived. We agree with the State.

Generally, a charging information may be amended at any time before, during or after trial as long as the amendment does not prejudice the substantial rights of the defendant. Parks v. State, 752 N.E.2d 63, 65 (Ind. Ct. App. 2001). The trial court may also allow an amendment of substantive character provided the defendant was given reasonable notice and the opportunity to be heard. Id. The requirement of an opportunity to be heard is satisfied when the defendant is given adequate time to object and request a hearing after proper notice. Id. To preserve this issue for appeal, the defendant must object to the request to amend, and if the

[1] The State cross-appeals alleging that the trial court abused its discretion when it permitted Holt to file a belated notice of appeal. We agree with the May 26, 2006 Order issued by a motions panel of this court denying the State's motion to dismiss on the same grounds. As such, we do not address the State's cross-appeal here.

objection is overruled, must request a continuance to prepare a new defense strategy. Id.

Here, it is undisputed that while Holt objected to the State's motion to amend the information, he did not request a continuance after the trial court overruled his objection. As such, the issue is waived. See id.

Issue Two: Evidence of Court Order

Holt next contends that the trial court abused its discretion when it took judicial notice and advised the jury that "at the time of the incidents in question [Holt] was under a court order that he must never be alone with nor have any contact with a child under the age of eighteen." Transcript at 199. Holt maintains that that constitutes evidence of his prior bad acts, the admission of which is prohibited by Indiana Evidence Rule 404(b), and that any probative value was far outweighed by unfair prejudice. The State asserts that the trial court did not abuse its discretion when it permitted that evidence because the evidence was not evidence of his prior bad acts and, in the alternative, was permissible under an exception to Rule 404(b). We agree with the State on the latter point.

The decision to admit or exclude evidence is within a trial court's sound discretion and is afforded great deference on appeal. Carpenter v. State, 786 N.E.2d 696, 702 (Ind. 2003). We will not reverse the trial court's decision unless it represents a manifest abuse of discretion that results in the denial of a fair trial. Id. An abuse of discretion occurs where the trial court's decision is clearly against

the logic and effect of the facts and circumstances before the court or it misinterprets the law. Id. at 703.

Indiana Evidence Rule 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. "It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" Id. The well-established rationale behind Evidence Rule 404(b) is that the jury is precluded from making the "forbidden inference" that the defendant had a criminal propensity and therefore engaged in the charged conduct. Rhodes v. State, 771 N.E.2d 1246, 1251 (Ind. Ct. App. 2002), trans. denied.

We agree with Holt that the only reasonable inference to be drawn from the challenged evidence is that the court order was the result of a prior bad act. But we agree with the State that the evidence was admissible under Evidence Rule 404(b) to show Holt's intent, knowledge, and absence of mistake. At trial, Holt pursued two defenses, namely, that he did not engage in sexual misconduct with S.T. and, in the alternative, that "he [was] reasonably deceived as to her age[.]" Transcript at 218. Holt asserted that he thought that S.T. was eighteen or nineteen years old at the time of the offenses.

A couple of months prior to trial, the State filed a notice of intent to introduce 404(b) evidence, namely, that Holt was under a court order to have no

contact with minor children. In deciding whether to admit that evidence at trial, the trial court stated in relevant part:

> I think the fact that he is operating under a no-contact order with anyone under the age of eighteen, you must never be alone with anyone under the age of eighteen, goes to the reasonableness—both the subjective and objective points of the defense; both whether he really did it and whether it was reasonable.

Id. at 16. The trial court subsequently clarified that it was permitting the evidence for the "limited purpose [of showing] absence of mistake." Id. at 92. And the trial court advised the jury that "at the time of the incidents in question the defendant was under a court order that he must never be alone with nor have any contact with a child under the age of eighteen." Id. at 199. The jury was not informed regarding the factual bases for that court order.

In Murray v. State, 742 N.E.2d 932 (Ind. 2001), the defendant was charged with murder and, at trial, he asserted that the shooting was accidental. During cross-examination, the Prosecutor asked the defendant whether he had a license to carry the gun he used to shoot the victim, and defense counsel objected. The trial court overruled that objection. On appeal, the defendant maintained that "evidence of the fact he was carrying the handgun unlawfully was inadmissible because: (1) it was irrelevant under Evidence Rule 401 and; (2) it constituted improper impeachment under Evidence Rule 404(b)." Id. at 933. Our supreme court addressed those arguments as follows:

> Evidence is relevant that tends 'to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'

Evid. Rule 401. As noted, appellant's defense was that the shooting was accidental. The fact that he was openly displaying a handgun knowing that there were penal consequences to being caught by the police with the gun tends to show that appellant had a serious, affirmative purpose in taking the handgun from the waistband of his pants.

In other words, a person who is unlawfully in possession of a firearm would be expected to keep that fact concealed. Therefore, when such a person openly brandishes a handgun, a fact-finder could conclude that the person was highly motivated by a specific intent for doing so. Thus, the fact that appellant's possession of the handgun was unlawful was relevant to his intent, and tended to negate his defense that the shooting was accidental.

Evidence that is nevertheless relevant may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Evid. Rule 403. The decision whether to exclude otherwise relevant evidence because of the danger of unfair prejudice or confusion is committed to the discretion of the trial court. Marcum v. State, 725 N.E.2d 852, 862 (Ind. 2000). Again, as noted, appellant admitted he was carrying a handgun. The fact that he was not properly licensed to do so does not create an undue suggestion of a propensity for violence. Moreover, as we have noted, the evidence of unlawful possession was relevant to a key issue at trial—appellant's intent. Any purported prejudice associated with this evidence does not substantially outweigh its probative value and we find no abuse of discretion in its admission.

Appellant also claims the evidence of his carrying a handgun unlawfully violated Evidence Rule 404(b) . . . . In order for evidence of other crimes, wrongs, or acts to be admissible, the trial court must determine whether the evidence is relevant "for other purposes" than the defendant's propensity to commit the charged act and must balance the probative value of the evidence against its potential prejudicial effect pursuant to Evidence Rule 403. Evid. Rule 404(b); Barker [v. State, 695 N.E.2d 925,] 930 [Ind. 1998]. . . .

One of the "other purposes" for which evidence of other crimes may be admissible is to show intent. Evid. Rule 404(b). We have already stated that appellant's carrying and openly brandishing the handgun illegally is relevant to his intent and that the probative

> value of this evidence is not substantially outweighed by any potential prejudice. The trial court committed no error in the admission of this evidence.

Id. at 933-34 (emphases added).

Similarly, here, Holt asserts that his having sex with a minor was an "accident" since he thought that S.T. was eighteen or older. Whether his alleged misunderstanding was reasonable was a key issue at trial, and the fact that he was under a court order to not have any contact with minors was relevant to a determination of Holt's intent, knowledge, and absence of mistake. In other words, because Holt knew that there were penal consequences for even talking to a girl under the age of eighteen, the evidence of the court order tends to show that he had a "serious, affirmative purpose" in consorting with S.T. See id. at 933. And while the potential prejudicial impact of that evidence is relatively high, we cannot say that the trial court abused its discretion when it found that the probative value outweighed any prejudice. The prejudicial impact was significantly mitigated by the lack of any reference to the underlying criminal act, and we note that Holt did not ask that the trial court admonish the jury as to the limited admissibility of the evidence. See, e.g., Humphrey v. State, 680 N.E.2d 836, 839 (Ind. 1997) (observing onus is on defendant to request a limiting admonition when evidence is admissible for one purpose but not another).

Issue Three: Cross-examination

Holt next contends that the trial court abused its discretion when it restricted the scope of his cross-examination of S.T. during trial. In particular,

Holt maintains that he should have been permitted to question S.T. regarding her probationary status at the time she gave an initial statement to police and the fact that her twin sister was pregnant at the time of the alleged offenses.

The right to cross-examine witnesses is guaranteed by the Sixth Amendment to the United States Constitution and is one of the fundamental rights of our criminal justice system. Washington v. State, 840 N.E.2d 873, 886 (Ind. Ct. App. 2006), trans. denied. However, this right is subject to reasonable limitations imposed at the discretion of the trial court. Id. Trial courts retain wide latitude to impose reasonable limits on the right to cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. Id. We will find an abuse of discretion when the trial court controls the scope of cross-examination to the extent that a restriction substantially affects the defendant's rights. Id.

Holt first contends that he should have been permitted to question S.T. on whether she was on probation when she first spoke to a detective about Holt's shooting. Holt maintains that S.T.'s "initial statements may have been influenced by her probation status and the possibility that she might be returned to [a] detention facility." Brief of Appellant at 85. But, in his offer of proof, Holt did not establish that S.T. was on probation at the time of her initial statement. Defense counsel admitted that the court records were "not definitive" on that issue, and S.T. was not sure whether she was on probation when she first spoke to

the detective. Transcript at 82, 85. Moreover, S.T. explained that she did not tell the first detective that she had had sex with Holt because she had not done so at the time of that initial interview. When she spoke with the second detective, sometime later, she had had sex with Holt and revealed that information at that time. In addition, S.T. explained that she felt more comfortable talking to the second detective, who was a woman, than to the first detective, who was a man. For all of these reasons, Holt cannot show that the trial court abused its discretion when it precluded his cross-examination of S.T. regarding her probationary status.

Holt also maintains that he should have been permitted to ask S.T. whether her twin sister was pregnant at the time of the alleged incidents. Holt contends that that evidence was relevant to his defense because "[t]hat someone the exact age of [S.T.] was pregnant is certainly relevant to the issue of what [Holt] believed her age to be." Brief of Appellant at 17. But the State points out that another witness had already testified that S.T.'s twin sister was pregnant when Holt saw her and that "pregnancy has little to do with determining that a girl is of legal age for having sex." Brief of Appellee at 13. We agree that the proffered evidence was cumulative and was, at most, marginally relevant. See Washington, 840 N.E.2d at 886. As such, the trial court did not abuse its discretion when it precluded Holt from asking S.T. whether her sister had been pregnant.

Issue Four: Sufficiency of the Evidence

Holt next contends that the State presented insufficient evidence to support his convictions. When reviewing the claim of sufficiency of the evidence, we do

not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

Indiana Code Section 35-42-4-9 provides:

> (a) A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits sexual misconduct with a minor, a Class C felony. However, the offense is:
>
> > (1) a Class B felony if it is committed by a person at least twenty-one (21) years of age[.]

Indiana Code Section 35-41-5-1 provides:

> (a) A person attempts to commit a crime when, acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward commission of the crime. An attempt to commit a crime is a felony or misdemeanor of the same class as the crime attempted. However, an attempt to commit murder is a Class A felony.
>
> (b) It is no defense that, because of a misapprehension of the circumstances, it would have been impossible for the accused person to commit the crime attempted.

Holt maintains that because the undisputed evidence shows that S.T. was thirteen at the time of the alleged offenses, she was not "at least fourteen (14) years of age" as required by the statute. As such, Holt asserts that "the facts do not support a conviction for the crime charged." Brief of Appellant at 12. In

particular, Holt contends that "where every physical element of the offense is completed, there cannot be attempt." Id. at 13. We cannot agree.

In Laughner v. State, 769 N.E.2d 1147 (Ind. Ct. App. 2002), trans. denied, cert. denied, 538 U.S. 1013 (2003), the defendant was convicted of attempted child solicitation, which occurs when a person eighteen years old or older knowingly or intentionally solicits a child under fourteen years of age to engage in sexual intercourse, deviate sexual conduct, or fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person. Ind. Code § 35-42-4-6. A detective with the Indiana State Police Crimes Against Children Unit, Joel Metzger, entered a computer chat room portraying himself as a thirteen-year-old boy and met Laughner, then forty years old. After several conversations via instant messaging and telephone, Laughner eventually contacted Metzger, again asked his age, and then asked, "u wanna get off?" Id. at 1152. The two arranged to meet at a gas station later that day, and Metzger arrested Laughner upon his arrival.

On appeal from his conviction for attempted child solicitation, Laughner asserted that "a material element of the crime of attempted child solicitation over the internet is the existence of 'an actual child under the age of fourteen,' and therefore, 'one cannot be convicted of the attempted solicitation of an adult police officer posing as a child because of the failure to establish a material element of the offense.'" Id. at 1155. He further argued that "it was a 'legal impossibility' to commit attempted child solicitation in this case because Metzger, to whom he

directed the soliciting communication, was not a child under the age of fourteen." Id.

But we disagreed, since Laughner "'was not convicted of child solicitation; he was convicted of attempted child solicitation, and the age of the intended victim is not an essential element'" of the offense of attempted child solicitation. Id. We found support in our supreme court's opinion in Zickefoose v. State, 270 Ind. 618, 388 N.E.2d 507, 510 (Ind. 1979):

> It is not necessary that there be a present ability to complete the crime, nor is it necessary that the crime be factually possible. When the defendant has done all that he believes necessary to cause the particular result, regardless of what is actually possible under existing circumstances, he has committed an attempt. The liability of the defendant turns on his purpose as manifested through his conduct. If the defendant's conduct, in light of all the relevant facts involved, constitutes a substantial step toward the commission of the crime and is done with the necessary specific intent, then the defendant has committed an attempt.

(Emphasis added).

Likewise, here, while it was factually impossible for Holt to have had sex with a girl at least fourteen but less than sixteen years old, there is evidence showing that he believed S.T. to be fifteen years old, which is what she testified to having told him. As such, the evidence is sufficient to show that Holt knowingly or intentionally did all that he believed was necessary to have sexual intercourse and deviate sexual conduct with a child at least fourteen but less than sixteen years old. The evidence was sufficient to support his convictions.

Issue Five: Sentence

Finally, Holt contends that the trial court abused its discretion when it imposed an enhanced sentence. In particular, he maintains that the trial court erred when it identified the age of the victim as an aggravator and that his sentence is inappropriate in light of the nature of the offense and his character. We address each contention in turn.

Sentencing decisions lie within the sound discretion of the trial court and are reviewed only for an abuse of that discretion. Powell v. State, 751 N.E.2d 311, 314 (Ind. Ct. App. 2001). If the sentence imposed is authorized by statute, we will not revise or set aside the sentence unless it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B); McCann v. State, 749 N.E.2d 1116, 1121 (Ind. 2001). Here, the trial court identified no mitigators, but found the following aggravators at sentencing: (1) Holt's criminal history, including a murder conviction; (2) the fact that he was on probation at the time of the instant offenses; (3) the significant age difference between Holt and his victim; (4) the substantial risk that Holt will reoffend; (5) and his need of correctional and rehabilitative treatment that can best be provided by incarceration in a penal facility.

Holt's sole challenge regarding the aggravators is that the trial court erred when it identified the victim's young age as an aggravator.[2] Holt is correct that where a victim's age is an element of the offense, then it may not also constitute an aggravator to support an enhanced sentence. See McCarthy v. State, 749 N.E.2d 528, 539 (Ind. 2001).

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[2] Holt also "contends that a proper consideration of all proper aggravating and mitigating factors would not justify the maximum sentence imposed here for both the underlying offense and the Habitual Offender enhancement." Brief of Appellant at 21-22. But he does not support that contention with argument, so we do not address it. Regardless, we note that Holt makes no contention that the trial court failed to identify any proffered mitigators, and he challenges only one out of the five valid aggravators identified by the trial court.

However, the trial court may properly consider the particularized circumstances of the factual elements of an offense as aggravating factors. Id.

Here, the victim's age is an element of the offense. But the trial court did not merely cite S.T.'s age as an aggravator. Instead, the court stated:

> [The] Court finds the State has proved aggravator three, the age of the victim, in that there is an appreciable age difference, which the Court finds to be 35 and 15 [sic]. And the Court would note for the record in support of that aggravator the misrepresentation made to the victim of the age by the defendant.

Transcript at 275. Thus, the trial court went beyond merely using the victim's age as an aggravator and did not err when it identified the particularized factual circumstances of the offenses, namely, the significant age difference and the fact that Holt told S.T. that he was nineteen years old. See Kile v. State, 729 N.E.2d 211, 214 (Ind. Ct. App. 2000).

Next, Holt contends that his sentence is inappropriate in light of the nature of the offenses and his character. In particular, Holt maintains that because on the first day of trial the State offered him a plea agreement whereby the habitual offender count would be dismissed and he would be sentenced to the minimum sentence of six years, the imposition of a fifty-year sentence after trial "suggests" that he "may have been penalized for taking his case to trial." Brief of Appellant at 23. Holt asks that we revise his sentence or remand for resentencing in light of Article I, Section 16 of the Indiana Constitution, which requires that penalties be proportionate to the nature of the offense, and Article I, Section 18, which prohibits "vindictive justice."

The State counters that:

> The nature of the offenses in the present case is that Defendant had sexual intercourse and oral sex with a person that he believed was only fifteen years of age and that Defendant was able to have this relationship with the child because he lied to her about his age. Defendant told S.T. that he was only nineteen when he really was thirty-five years of age. Moreover, crimes against children are particularly contemptible.
>
> Defendant's character is that of a convicted child molester and murderer who cannot refrain from committing criminal acts

> even when on probation. Defendant is clearly a manipulative person, as is demonstrated by the lie about his age that he used to seduce the child in the present case. Defendant's character is of the worst kind and a severe sentence is required to protect society and children from this selfish and remorseless predator.

Brief of Appellee at 24 (citations omitted).

Our review of the sentencing transcript does not suggest that the trial court was engaging in "vindictive justice" or was otherwise motivated by a desire to punish Holt for rejecting the plea agreement. Instead, the trial court engaged in a thoughtful analysis of the nature of the offenses and Holt's character in imposing an enhanced sentence. In particular, the trial court observed that Holt's criminal history includes "a serious conviction for second degree murder out of Missouri, as well as the fact that he not only [had] been twice previously convicted of child molesting but was on probation for both of those charges at the time of this crime." Transcript at 274. The trial court also noted that the previous "effort at rehabilitation has not done anything to deter him, including a treatment order in both of the [prior child molest] cases. And put another way, . . . the court is convinced that Mr. Holt should not be around children[.]" Id. at 275-76.

As our supreme court has recognized, "[c]rimes against children are particularly contemptible." Walker v. State, 747 N.E.2d 536, 538 (Ind. 2001). Further, as the trial court noted, Holt has a prior murder conviction and he was on probation at the time of the instant offenses. Finally, Holt was adjudicated an habitual offender. We cannot say that his fifty-year sentence is inappropriate in light of the nature of the offenses and his character.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.